

3
No. 90-443

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

KERN RIVER GAS TRANSMISSION COMPANY,
Petitioner,

v.

THE COASTAL CORPORATION,
COLORADO INTERSTATE CORPORATION,
COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN
PIPELINE COMPANY, and
WYOMING-CALIFORNIA PIPELINE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE ON BEHALF OF WIDE
WORLD OF MAPS, INC. IN SUPPORT OF PETITIONER

MARSHALL A. LEHMAN
LEHMAN, ROACH, TATHAM & BAUMAN
The Esplanade
2425 East Camelback, Suite 850
Phoenix, AZ 85016
(602) 381-8000

BEST AVAILABLE COPY



IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 90-443

KERN RIVER GAS TRANSMISSION COMPANY
Petitioner,

v.

THE COASTAL CORPORATION,
COLORADO INTERSTATE CORPORATION,
COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN PIPELINE COMPANY,
and WYOMING-CALIFORNIA PIPELINE COMPANY
Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Wide World of Maps, Inc., an Arizona corporation (hereinafter "Amicus") having a direct interest in the outcome of the captioned case, respectfully moves this Court for leave to file the attached brief *amicus curiae* in this case. Petitioner has consented to Amicus' filing of this brief. The consent of respondent, The Coastal Corporation, et al., was requested but refused.

STATEMENT OF INTEREST

Wide World of Maps, Inc. (hereinafter "Amicus") is an Arizona corporation engaged in the cartographic industry. Amicus is the largest map retailer in the United States. Amicus spends hundreds of thousands of dollars every year on cartography and other costs associated with the development and publication of its maps for sale.

For the reasons stated below, Amicus believes that the decision of the Fifth Circuit in this case, if allowed to stand, would have a devastating impact on the copyright protection available for its maps, and for maps generally, and that the decision of the Fifth Circuit Court has a direct, damaging and unwarranted impact on all commercial map makers. Amicus accordingly urges the Court to grant the Petition for Certiorari filed by Kern River Gas Transmission Co. (hereinafter "Kern River") and to reverse the decision of the Court of Appeals below.

REASONS FOR GRANTING THE MOTION

As grounds for this Motion, Amicus would show the Court that it is actively engaged in the cartographic business and is the largest map retailer in the United States. Amicus spends hundreds of thousands of dollars every year on cartography and other costs associated with the development and publication of its maps for sale. For the reasons stated in Amicus' brief filed herewith, Amicus believes that the decision of the Fifth Circuit in this case, if allowed to stand, would have a devastating impact on the copyright protection available for its maps, and for maps generally, and that the decision of the Fifth Circuit Court has a direct, damaging and unwarranted impact on all commercial map makers.

CONCLUSION

WHEREFORE, Amicus moves the Court for leave to appear in support of the Petition for Certiorari herein and to file brief attached hereto.

Respectfully submitted,
WIDE WORLD OF MAPS, INC.

By: Marshall Lehman
Marshall A. Lehman
LEHMAN, ROACH, TATHAM
& BAUMAN
The Esplanade
2425 East Camelback, Suite 850
Phoenix, Arizona 85016
(602) 381-8000

October 15, 1990

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 15, 1990, copies of the foregoing AMICUS BRIEF OF WIDE WORLD OF MAPS, INC. IN SUPPORT OF PETITION FOR CERTIORARI were sent by first class mail, postage prepaid, to the following counsel of record:

Robin C. Gibbs, Esq.
J. Christopher Reynolds, Esq.
Robert N. Brailas, Esq.
GIBBS & RATLIFF
3400 Interfirst Plaza
1100 Louisiana
Houston, Texas 77002

Larry C. Jones, Esq.
James W. Repass, Esq.
FULBRIGHT & JAWORSKI
1301 McKinney
51st Floor
Houston, Texas 77010

J. Timothy Hobbs
MASON, FENWICK & LAWRENCE
1225 Eye St., N.W., Suite 1000
Washington, D.C. 20005

Marshall Lehman
Marshall A. Lehman
LEHMAN, ROACH, TATHAM & BAUMAN

October 15, 1990

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
INTEREST OF WIDE WORLD OF MAPS, INC. AS AMICUS CURIAE	1
ARGUMENT	2
THE FIFTH CIRCUIT'S DECISION BELOW DEPARTS RADICALLY FROM THE LAW OF OTHER CIRCUITS AND POSES AN IMMEDIATE THREAT TO ALL MAPMAKERS BY NEGATING COPYRIGHT PROTECTION FOR MAPS GENERALLY.	2
I. The Fifth Circuit's Opinion Departs Radically From The Law Of Other Circuits In Respect To Copyright Protection For Maps.	2
II. The Principle Announced By The Fifth Circuit Poses An Immediate Threat To All Mapmakers By Negating Protection For Maps Generally. 7	
III. The Issue Raised By This Case Warrants A Writ Of Certiorari.	8
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

CASES:	Page
<i>Amsterdam v. Triangle Publications, Inc.</i> , 189 F.2d 104 (3d Cir. 1951)	4
<i>Baker v. Selden</i> , 101 U.S. 99 (1879)	6
<i>Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.</i> , 441 U.S. 1 (1979)	9
<i>C.S. Hammond & Co. v. International College Globe, Inc.</i> , 210 F.Supp. 206 (S.D.N.Y. 1962)	5
<i>Community for Creative Non-Violence v. Reid</i> , ___ U.S. ___, 104 L.Ed.2d 811 (1989)	8
<i>Crocker v. General Drafting Co.</i> , 50 F.Supp. 634 (S.D.N.Y. 1943)	6
<i>County of Ventura v. Blackburn</i> , 362 F.2d 515 (9th Cir. 1966)	4
<i>Del Madera Properties v. Rhodes & Gardner, Inc.</i> , 820 F.2d 973 (9th Cir. 1987)	5
<i>DeSylva v. Ballentine</i> , 351 U.S. 570 (1956)	9
<i>Dowling v. United States</i> , 473 U.S. 207 (1985)	8

TABLE OF AUTHORITIES---Continued

<i>Cases:</i>	<i>Page</i>
<i>Emerson v. Davies</i> , 8 Fed. Cas. 615 (No. 4436 (C.C.D. Mass. 1845)	3, 8
<i>F.L. Woolworth Co. v. Contemporary Arts, Inc.</i> , 344 U.S. 228 (1952)	8
<i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968)	9
<i>Fred Fisher Music Co. v. M. Witmark & Sons</i> , 318 U.S. 643 (1943)	9
<i>General Drafting Co. v. Andrews</i> , 37 F.2d 54 (2d Cir. 1930)	4, 5
<i>Gray v. Russell</i> , 10 F. Cas. 1035 (No. 5728) (C.C.D. Mass. 1839)	2, 3, 8
<i>Mazer v. Stein</i> , 347 U.S. 201 (1954)	9
<i>Mills Music, Inc. v. Snyder</i> , 469 U.S. 153 (1985)	9
<i>Newton v. Voris</i> , 364 F.Supp. 562 (D.Ore. 1973)	6
<i>Sawyer v. Crowell Publishing Co.</i> , 142 F.2d 497 (2d Cir. 1944)	5

TABLE OF AUTHORITIES---Continued

<i>Cases:</i>	<i>Page</i>
<i>Sheldon v. Metro-Goldwyn Pictures Corp.</i> , 309 U.S. 390 (1940)	9
<i>Stewart v. Abend</i> , ___ U.S. ___, 109 L.Ed.2d 184, 201 (1990)	8
<i>Teleprompter Corp. v. Columbia Broadcasting System</i> , 415 U.S. 394 (1974)	9
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975)	8
<i>United States v. Hamilton</i> , 583 F.2d 448 (9th Cir. 1978)	4, 5
<i>Woodman v. Lydiard-Peterson Co.</i> , 192 F. 67 (C.C.D.Minn. 1912), <i>aff'd</i> , 204 F. 921 (8th Cir. 1913)	5

<i>MISCELLANEOUS</i>	<i>Page</i>
Gorman, <i>Fact or Fancy? The Implications for Copyright</i> , 29 J. Copyright Soc'y USA 560, 564 (1982)	7
Whicher, <i>Originality, Cartography, and Copyright</i> , 38 N.Y.U.L.Rev. 281 (1963)	3

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 90-443

KERN RIVER GAS TRANSMISSION COMPANY
Petitioner,

v.

THE COASTAL CORPORATION,
COLORADO INTERSTATE CORPORATION,
COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN PIPELINE COMPANY,
and WYOMING-CALIFORNIA PIPELINE COMPANY
Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF
WIDE WORLD OF MAPS, INC.
IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Wide World of Maps, Inc. (hereinafter "Amicus") is an Arizona corporation engaged in the cartographic industry. Amicus is the largest map retailer in the United States.

Amicus spends hundreds of thousands of dollars every year on cartography and other costs associated with the development and publication of its maps for sale.

For the reasons stated below, Amicus believes that the decision of the Fifth Circuit in this case, if allowed to stand, would have a devastating impact on the copyright protection available for its maps, and for maps generally, and that the decision of the Fifth Circuit Court has a direct, damaging and unwarranted impact on all commercial map makers. Amicus accordingly urges the Court to grant the Petition for Certiorari filed by Kern River Gas Transmission Co. (hereinafter "Kern River") and to reverse the decision of the Court of Appeals below.

ARGUMENT

**THE FIFTH CIRCUIT'S DECISION BELOW
DEPARTS RADICALLY FROM THE LAW OF OTHER
CIRCUITS AND POSES AN IMMEDIATE THREAT TO
ALL MAPMAKERS BY NEGATING COPYRIGHT
PROTECTION FOR MAPS GENERALLY.**

**I. THE FIFTH CIRCUIT'S OPINION
DEPARTS RADICALLY FROM THE LAW
OF OTHER CIRCUITS IN RESPECT TO
COPYRIGHT PROTECTION FOR MAPS.**

In permitting the Respondents herein to avail themselves of the time, expense and creative efforts undertaken by Petitioner's cartographers, the Fifth Circuit's opinion below flies in the face of Justice Story's pronouncements in *Gray v.*

Russell, 10 F. Cas. 1035 (No. 5728) (C.C.D. Mass. 1839),¹ and *Emerson v. Davies*, 8 Fed. Cas. 615 (No. 4436 (C.C.D. Mass. 1845)).² Moreover, the result reached by the Fifth Circuit is in basic conflict with the law of every other Circuit to consider the extent of copyright protection available for maps.

Although there has been a degree of controversy throughout the years over the extent of protection available for maps under the U.S. copyright law, the primary debate has always been over the degree of *originality* a map must exhibit to warrant such protection. See, e.g., Whicher, *Originality, Cartography, and Copyright*, 38 N.Y.U.L.Rev. 281 (1963).

¹ In *Gray v. Russell*, Justice Story of this Court stated:

[S]uppose a person has bestowed his time and skill and attention, and made a large series of topographical surveys in order to perfect such a map... It is clear, that notwithstanding this production, he cannot supersede the right of any other person to use the same means by similar surveys and labors to accomplish the same end. But it is just as clear, that *he has no right, without any such surveys and labors, to sit down and copy the whole of the map already produced by the skill and labors of the first party...*

10 F. Cas. at 1037-38 (emphasis added). See Petitioner's Brief at 13-14.

² In *Emerson v. Davies*, Justice Story stated:

A man...has no right to publish a map taken substantially and designedly from the map of the other person, without any ... exercise of skill, or labor, or expense. If he copies substantially from the map of the other, it is *downright piracy*; although it is plain that both maps must, the more accurate they are, approach nearer in design and execution to each other.

8 F. Cas. at 619 (emphasis added). See Petitioner's Brief at 14.

The caselaw in this area falls generally into two groups: (1) decisions recognizing copyright protection for *any* map displaying a requisite degree of originality, even if the map was prepared exclusively through a compilation of cartographic sources already in existence,³ and (2) cases requiring *additionally* that the map be prepared on the basis of independent field observations by the cartographer.⁴

Under either of these viewpoints, original maps such as those of the Petitioner in this case, prepared on the basis of independent observations and field surveys, would be entitled to copyright protection. In fact, maps such as those of Petitioner have been consistently held entitled to copyright protection.

For example, in *County of Ventura v. Blackburn*, 362 F.2d 515 (9th Cir. 1966), the plaintiff took road and street data from government maps and other sources; identified owners and land parcels from the Ventura County assessor's records and corrected such errors on the map; took data on such features as rivers, canyons, creeks, and drainage channels from aerial photographs and United States topographical maps; and checked various legal descriptions of boundaries of cities against the county records. The court upheld the validity of the map copyright where the plaintiff mapmaker "spent time and effort to compile, collate, assemble, draft and prepare the information depicted" on the map. 362 F.2d at 517.

Similarly, in *General Drafting Co. v. Andrews*, 37 F.2d 54 (2d Cir. 1930), the court held that the plaintiff's road maps

³ E.g., *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978).

⁴ E.g., *Amsterdam v. Triangle Publications, Inc.*, 189 F.2d 104 (3d Cir. 1951).

were copyrightable where the mapmaker, like Petitioner in the present case, began with topographical maps obtained from the United States Geological Survey (USGS). The facts in *General Drafting Co.* are remarkably similar to those of the present case. The plaintiff in *General Drafting Co.* started by securing USGS maps and then, like the Petitioner herein, obtained detailed information concerning the conditions through personal interviews with county engineers. The plaintiff then recorded such information upon the USGS maps, designating each road condition as "first class," "second class," or "third class," having regard solely to its availability for automobile travel. In many cases the plaintiff verified by direct observation the actual physical condition of the road, and then transferred this detailed information to a base map composed of a large number of individual USGS maps. At this stage, the process of selection was begun; a large tracing was made of the assembled section of maps, but only such information as the plaintiff mapmaker thought would be of use to motorists. The relative condition of each road was indicated on the tracing by a double, heavy line, or a thin, single line; the large tracing was photographically reduced to the desired size; and a smaller tracing was made, on which the information was finally audited and corrected before the map was hand drawn. The lower court in *General Drafting Co.* denied relief, but the court of appeals reversed, holding that the maps were "clearly the subject of copyright. 37 F.2d at 55, citing *Woodman v. Lydiard-Peterson Co.*, 192 F. 67 (C.C.D.Minn. 1912), *aff'd*, 204 F. 921 (8th Cir. 1913).

- These cases, and a number of others like them,⁵

⁵ E.g., *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987); *Sawyer v. Crowell Publishing Co.*, 142 F.2d 497 (2d Cir. 1944); *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978); *C.S. Hammond & Co. v. International College Globe, Inc.*, 210 F.Supp. 206

illustrate that the maps created by Petitioner herein surpass, by orders of magnitude, the threshold of originality necessary to sustain copyright protection.

In its decision below, however, the Fifth Circuit seemed to acknowledge that the Petitioner's maps displayed the requisite originality.⁶ However, the Court of Appeals cited the "merger" doctrine of *Baker v. Selden*, 101 U.S. 99 (1879), as a basis for finding an unprecedented limitation on copyright protection of maps where the particular cartographic expression represents "the only effective way to convey the idea of the ... location" illustrated in the map. 899 F.2d at 1464.

Petitioner is correct in stating that the Fifth Circuit is the first court to deny copyright protection to a map on the basis of the so-called "merger" doctrine where the map contains an original contribution based on direct observation. See Petitioner's Brief at 15-16. As discussed below, the implications of this holding for Amicus, and for all cartographers, are devastating.

(S.D.N.Y. 1962); *Crocker v. General Drafting Co.*, 50 F.Supp. 634 (S.D.N.Y. 1943); *Newton v. Voris*, 364 F.Supp. 562 (D.Ore. 1973).

⁶ The court stated, "The problem for the copyrightability of the resulting maps...is not a lack of originality, but rather that the maps created express in the only effective way the idea of the location of the pipeline." 899 F.2d at 1464.

II. THE PRINCIPLE ANNOUNCED BY THE FIFTH CIRCUIT POSES AN IMMEDIATE THREAT TO ALL MAPMAKERS BY NEGATING PROTECTION FOR MAPS GENERALLY.

The Court of Appeals below found that the lines drawn on the Petitioner's maps "are certainly the only effective way to convey the idea of the proposed location of a pipeline across 1,000 miles of terrain." 899 F.2d at 1464. The Court of Appeals held that Petitioner's maps were precluded from copyright protection because they "express in the only effective manner the idea of the pipeline's location." 899 F.2d at 1464.

By implication, the original cartographic work of *any* mapmaker is also precluded from copyright protection if the lines drawn by the mapmaker represent the "only effective manner" in which the location of a particular subject can be expressed. This is an astonishing proposition, completely lacking in precedent, which ignores the basic concept known to all cartographers that lines on a map characteristically *are* the "only effective manner" in which the concept of location can be expressed. As stated by the leading scholar on copyright protection in fact works:

If ever there were a literary or art form in which fancy is generally to be discouraged, and in which expression is dictated by fact, it is the map.

Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. Copyright Soc'y USA 560, 564 (1982).

The chilling effect of the Court of Appeals' opinion in this case cannot be overstated. Mapmakers such as Amicus rely on the copyright law to protect their investment of time,

effort, expense and creativity. As Justice Story recognized in 1839, the very purpose of the copyright law is to protect such "time and skill and attention." *Gray v. Russell*, 10 F. Cas. 1035, 1037-38 (No. 5728) (C.C.D.Mass. 1839). On behalf of itself and all cartographers, Amicus urges the Court to grant Kern River's Petition for Certiorari and correct this serious error of law.

III. THE ISSUE RAISED BY THIS CASE WARRANTS A WRIT OF CERTIORARI.

The issue raised in this case meets or surpasses the degree of importance necessary to sustain a writ of certiorari. As discussed above, the Fifth Circuit's opinion contradicts the basic law of copyright for maps expressed by Justice Story in *Gray v. Russell*, 10 F. Cas. 1035 (No. 5728) (C.C.D.Mass. 1839), and *Emerson v. Davies*, 8 Fed. Cas. 615 (No. 4436) (C.C.D. Mass. 1845). This fact alone should suffice to warrant a writ of certiorari. Cf. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154 (1975) (certiorari granted in copyright case to determine whether decision below conflicted with previous Supreme Court holdings).

Moreover, this Court has granted writs of certiorari in copyright cases to resolve conflicts of law among the Circuits which were no more far-reaching than that created by the Fifth Circuit's departure from established precedent in the present case. Compare, *Stewart v. Abend*, ___ U.S. ___, ___, 109 L. Ed.2d 184, 201 (1990); *Community for Creative Non-Violence v. Reid*, ___ U.S. ___, ___ & n. 2, 104 L. Ed.2d 811, 822 & n. 2 (1989); *Dowling v. United States*, 473 U.S. 207, 213 n. 6 (1985); *Mazer v. Stein*, 347 U.S. 201, 203 & n. 3 (1954); *F.L. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 229 & n. 3 (1952).

Even in the absence of a specific conflict among the Circuits, this Court has granted petitions for certiorari in copyright cases to resolve "important question[s] of copyright law." *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 163 (1985); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 7 (1979); *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394, 400 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393 (1968); *DeSylva v. Ballentine*, 351 U.S. 570, 572 (1956); *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 647 (1943); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 396-97 (1940).

For the reasons stated above, Amicus submits that the present case raises an issue of unprecedented importance to the mapmaking industry which should be addressed by this Court.

CONCLUSION

For all the reasons discussed herein, Amicus urges the Court to grant Kern River's Petition for Certiorari herein and to reverse the decision of the Court of Appeals below.

Respectfully submitted,
WIDE WORLD OF MAPS, INC.

By: Marshall Lehman
Marshall A. Lehman
LEHMAN, ROACH, TATHAM & BAUMAN
The Esplanade
2425 East Camelback, Suite 850
Phoenix, Arizona 85016
(602) 381-8000

October 15, 1990

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 15, 1990, copies of the foregoing MOTION OF WIDE WORLD OF MAPS, INC. TO APPEAR AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI were sent by first class mail, postage prepaid, to the following counsel of record:

Robin C. Gibbs, Esq.
J. Christopher Reynolds, Esq.
Robert N. Brailas, Esq.
GIBBS & RATLIFF
3400 Interfirst Plaza
1100 Louisiana
Houston, Texas 77002

Larry C. Jones, Esq.
James W. Repass, Esq.
FULBRIGHT & JAWORSKI
1301 McKinney
51st Floor
Houston, Texas 77010

J. Timothy Hobbs
MASON, FENWICK & LAWRENCE
1225 Eye St., N.W., Suite 1000
Washington, D.C. 20005

Marshall Lehman

Marshall A. Lehman
LEHMAN, ROACH, TATHAM
& BAUMAN

October 15, 1990